STATE OF MICHIGAN
IN THE SUPREME COURT

THE ESTATE OF MARGARETTE F. EBY
Deceased, by its Personal Representative,
DAYLE TRENTADUE,

Plaintiff-Appellee,

v

MFO MANAGEMENT COMPANY,

Defendant-Appellant,

and

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS, and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, Deceased,

Defendants.

Docket Nos. 128623, 128624, 128625

Court of Appeals Nos. 252155, 252207, 252209

Genesee Circuit Court
No. 02-074145-NZ

APPELLANT MFO MANAGEMENT COMPANY'S BRIEF IN RESPONSE TO THE AMICI CURIAE BRIEFS RE DUE PROCESS

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COUNTERSTATEMENT OF QUESTION PRESENTED

I. The Due Process clauses of the state and federal constitutions prevent the Legislature from passing a statute that deprives a person of a vested right without due process of law. Statutes that bar causes of action before they are discovered or accrue do not violate due process. Is MCL 600.5827 constitutional even if this Court overrules common-law discovery rules?

The trial court did not answer this question.

The Court of Appeals did not answer this question.

The Amici Curiae answer, "No."

Defendant-Appellant MFO Management Company submits that the correct answer is, "YES."

INTRODUCTION

In its order granting defendants' application for leave to appeal, the parties were directed to answer the question of whether this Court should overrule its previous cases applying a common-law discovery rule as being inconsistent with or contravening MCL 600.5827. Two groups of amici curiae, one a group of unnamed "asbestos claimants" represented by the law firm of Goldberg, Persky and White, P.C. (the "Goldberg amici"), and the other the State Bar of Michigan's Negligence Section filed amicus curiae briefs with this Court, urging that abolishing the common-law discovery rule would violate due process. A second group of asbestos plaintiffs has also filed a motion (and proposed brief) asking for amicus status and addressing this issue.

ARGUMENT

The Due Process clauses of the state and federal constitutions prevent the Legislature from passing a statute that deprives a person of a vested right without due process of law. Statutes that bar causes of action before they are discovered or accrue do not violate due process. MCL 600.5827 does not need a discovery rule to comport with due process.

A. Due process generally and the test applicable to statutes of limitation

Both the United States Constitution[1] and the Michigan Constitution[2] guarantee that one will not be deprived of life, liberty, or property without due process of law. Michigan's due process clause is coextensive with the federal due process clause. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998). And "Michigan has, of course, adhered to the rule that a state

[1] US Const, Am XIV.
[2] Const 1963, Art 1 § 17.

court is bound by the authoritative holdings of federal courts upon federal questions." *Schueler v Weintrob*, 360 Mich 621, 633; 105 NW2d 42 (1960).

"Statutes must be construed in a constitutional manner if possible, and the burden of proving that a statute is unconstitutional is on the party challenging it." *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000), citing *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998).

The constitutionality of a statute is a question this Court reviews *de novo*. *Phillips v Mirac*, 470 Mich 415, 422; 685 NW2d 174 (2004).

1. The rational basis test is used to analyze statutes of limitation.

"To analyze whether a plaintiff's due process rights have been violated, we determine 'whether the legislation bears a reasonable relation to a permissible legislative objective.'" *Phillips, supra,* at 436. The "reasonable relation" test is "in essence, the same test" as the rational basis test used in equal protection analysis. *Id.* at 435, 436. The rational basis test considers whether the statute is "'"rationally related to a legitimate government interest."'" *Id.* at 434, quoting *Shavers v Attorney General*, 402 Mich 554, 613; 267 NW2d 72 (1978). "But the rational basis test does not test 'the wisdom, need, or appropriateness of the legislation . . . .'" *Id.* at 434.

The Goldberg amici urge this Court to apply a "strict scrutiny" test in its due process analysis.[3] But strict scrutiny review is appropriate only where a statute affects a "suspect classification," such as race or ethnicity, or a fundamental right. *Phillips*, *supra* at 434. The Goldberg amici rely on *Wolff v McDonnell*, 418 US 539, 579; 94 S Ct 2963 (1974), in support of their assertion that MCL 600.5827 implicates a "fundamental right" of "access to the

[3] The Negligence Section amicus does not specify the test it believes should be employed.

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courts." *Wolff*, however, dealt with the requirement that prisons provide inmates with adequate legal representation, and access to a law library, to enable them to pursue petitions for writs of habeas corpus and civil rights claims. *Id.* at 579. "There is no absolute and unlimited constitutional right of access to courts." *Ciccarelli v Carey Canadian Mines*, 757 F2d 548, 554 (CA, 3 1985), citing *Wayne v Tennessee Valley Auth*, 730 F2d 392, 403 (CA 5, 1984). "Before a 'compelling interest' standard of strict scrutiny is applied, the right that plaintiffs seek to vindicate by access to the courts must be a fundamental right." *Wayne*, *supra* at 403 n 9. There is no "fundamental right to recover on a tort claim." *Wall v Cherrydale Farms, Inc*, 9 F Supp 2d 784 (ED Mich, 1998).

The United States Court of Appeals for the Sixth Circuit also applied a rational basis test when rejecting a due process challenge to a statute of limitations. *Mathis v Eli Lilly & Co*, 719 F2d 134 (CA 6, 1983). The court quoted with approval from a lower federal court case applying a rational basis test to an Ohio statute of limitations: "'since there is no fundamental right to have access to courts to secure remedies for injuries, and since the instant claim involves a common law right rather than one entitled to special constitutional protection, access to the courts may be proscribed if there is a rational basis for so doing.'" *Id.* at 139, quoting *Adair v Koppers Co*, 541 F Supp 1120, 1128 (ND Ohio, 1982).

2. *MCL 600.5827 has a rational basis and is reasonably related to a legitimate government interest.*

Statutes of limitation have a rational basis: promoting the prompt prosecution of lawsuits, protecting against stale and fraudulent claims, and preventing inconvenience:

> "By enacting a statute of limitations, the ***Legislature determines the reasonable period of time*** given to a plaintiff to pursue a claim. The policy reasons behind statutes of limitation include: the prompt recovery of damages, penalizing plaintiffs who are

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> not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay . . . ." [*Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003) (emphasis added).]

The United States Supreme Court, upholding the constitutionality of a federal statute of limitations, stressed that defendants have a "right to be free of stale claims" and that this right "prevail[s] over the right to prosecute them." *United States v Kubrick*, 444 US 111, 117; 100 S Ct 352 (1979) (citations omitted).

B. MCL 600.5827 and common-law discovery rules

1. The origins of the common-law discovery rule

MCL 600.5827 specifies that a statute of limitations begins to run "from the time the claim accrues." The statute provides that "time the claim accrues" is "at the time the wrong upon which the claim is based was done regardless of the time when damage results" unless a different time is provided in MCL 600.5829-600.5838. *Id.*

Despite the absence of any discovery rule in MCL 600.5827, and even though such a rule is inconsistent with the plain language of the statute, Michigan courts have sometimes applied a common-law discovery rule anyway. In *Dyke v Richard*, 390 Mich 739; 213 NW2d 185 (1973), the Court decided whether MCL 600.5838 [which then contained no discovery rule] abrogated the common-law rule set forth in *Johnson v Caldwell*, 371 Mich 368; 123 NW2d 785 (1963). The *Dyke* Court held that due process required engrafting a discovery rule onto the medical malpractice statute of limitations regardless of the statutory language. *Id.* at 744-747. The *Dyke* Court relied on *Price v Hopkin*, 13 Mich 318, 324 (1865). In the ancient *Price* case, however, the question was not whether there should be a discovery rule, but whether the amendment of a statute of limitation could retroactively bar a suit that would have

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been timely under the old law. The *Dyke* Court nevertheless relied on *Price*, *supra* to hold that due process required it to apply a common-law discovery rule. *Dyke*, *supra* at 744-747.

2. *Justices Brennan and Coleman asserted that the Dyke majority opinion was "judicial legislation."*

Criticism of the judicial activism that prompted creation of a discovery rule despite the language of MCL 600.5827 began as early as *Dyke* itself. In *Dyke*, Justice Brennan asserted that the majority erred by conferring "constitutional status" on the common-law discovery rule:

> [The majority] opinion . . . elevate[s] the discovery rule to constitutional status, concluding, in effect, that no statute of limitations can bar a cause of action until the same has been discovered, or, in the exercise of reasonable diligence, should have been discovered.
>
> I believe that is an unwarranted interference with the power of the Legislature.
>
> I believe that the Legislature does have the power to declare the time within which rights must be discovered, as well as asserted, and judicial disagreement with the wisdom of such policy does not justify nullification of the statute. [*Id.* at 748-749 (Brennan, J., dissenting).]

Justice Coleman concurred with Justice Brennan but also wrote separately and went a step further, describing the majority opinion as "a clear case of judicial legislation." *Dyke*, *supra* at 749 (Coleman, J., dissenting). Justice Coleman stressed that "[a]lthough individuals may differ as to the wisdom of the legislation, it is not our function to rewrite it." *Id.*

C. *Statutes that bar causes of action before they are discovered do not offend due process*

Seven years after its decision in *Dyke*, this Court upheld the Legislature's "power to declare the time within which rights must be discovered," *Dyke*, *supra* at 749 (Brennan, J., dissenting), in *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980). *O'Brien*, examines the constitutionality of MCL 600.5839(1), which provides that no cause of action

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against a licensed architect or professional engineer who designed or supervised construction of an improvement to real property can be brought more than six years after the occupancy, use, or acceptance of the improvement.[4] The *O'Brien* plaintiffs relied on *Dyke* and claimed that this violated due process by barring a cause of action before it accrued.

This Court rejected the plaintiffs' due process argument, stressing that "[t]he power of the Legislature to determine the conditions under which a right may accrue and the period within which a right may be asserted is undoubted." *Id.* at 14. The Court held that "[s]tatutes enacted in the exercise of that power serve the permissible legislative objective of relieving defendants of the burden of defending claims brought after the time so established." *Id.* The Court also explained that it had "previously recognized the Legislature's constitutional power to change the common law authorizes it to extinguish common-law rights of action." *O'Brien, supra* at 15. The *O'Brien* Court reasoned that "[i]f the Legislature can entirely abrogate a common-law right, surely it may provide that a particular cause of action can no longer arise unless it accrues within a specified period of time." *Id.*

O'Brien does not stand alone in recognizing that the legislative prerogative to establish when limitation and repose periods stop (and start) is no offense to due process. Michigan courts have also rejected due process challenges to other statutes that have modified the timing of causes of action. In *Bissell v Kommareddi*, 202 Mich App 578; 509 NW2d 542 (1993), the Court of Appeals considered the constitutionality of MCL 600.5851(7), which dramatically shortens the time available to minors to file medical malpractice actions. The court rejected plaintiffs' due process argument finding no constitutionally unreasonable limitation:

[4] In 1985, the Legislature amended MCL 600.5839. The statute now provides that claims must be brought either within the six-year period or within one year of when the defect was or should reasonably have been discovered, but no more than "10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement."

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> With respect to plaintiff's due process challenge, statutes of limitation are to be upheld unless it can be demonstrated that their consequences are so harsh and unreasonable that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right. *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978). *Bissell* at 543-544.

Severely reining in the "long tail" that allowed other minors to timely sue within one year of their majority squared with due process; it was still "more than a reasonable amount of time for their claims to be pursued." *Id.*

MCL 600.5838a(2), the medical malpractice limitation statute, allows maintenance of lawsuits within six months of when a patient discovers or should have discovered the claim. It also contains a six-year statute of repose, as reckoned from the date of the act or omission that is the basis for the claim. In *Sills v Oakland General*, 220 Mich App 303; 559 NW2d 348 (1996), the repose overlay was found to comport with due process. "The Legislature has the power to determine that a particular cause of action cannot arise unless it accrues within a specified period." *Id* at 312. The panel held that the statute was "not so harsh and unreasonable that it effectively denies a plaintiff access to the courts." *Id.*

What these modern era Michigan cases teach is that legislative prerogatives must be respected when it comes to timely filing of lawsuits.

Cases recognizing the resilience of statutes of limitation and repose in the face of due process challenges exist in the federal system as well. The plaintiff in *Pitts v Unarco Industries, Inc*, 712 F2d 276, 279 (CA 7, 1983), seeking damages for asbestos-related disease, argued that a statute of repose in the Indiana Products Liability Act violated due process because it barred her claim before it arose. The court rejected the argument, stressing that plaintiff's cause of action did not accrue until her husband's death, which occurred after the statute was enacted. The court reasoned that though "[a]n accrued cause of action is a right of

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property protected by the Fourteenth Amendment, an unaccrued cause of action is not." *Id.* The court also emphasized that the Legislature has the power to limit or even eliminate causes of action: "The Indiana legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute remains on the books in case their spouses are ever killed because of someone else's negligence. Such a hope is protected by the voting booth, not by the federal courts." *Id.*

The plaintiffs in *Alexander v Beech Aircraft Corp*, 952 F2d 1215, 1224-1225 (CA 10, 1991) argued that the Indiana Products Liability Act's statute of repose violated due process because it barred claims before they arose. The Tenth Circuit disagreed. *Id.* at 1225, quoting *Pitts, supra* at 279. Mere "harsh" results do not render statutes unconstitutional. *Id.* at 1225. The asbestos injury plaintiffs in *Braswell v Flintkote Mines, Ltd*, 723 F2d 527 (CA 7, 1983) also mounted an unsuccessful due process challenge to the same Indiana statute of repose. The court held that the statute did not violate due process because it was "consistent with" the "policies which support statutes of limitations." *Id.* at 529-530.

Ciccarelli, supra is another wrongful death asbestos injury case. The plaintiffs alleged that Pennsylvania's wrongful death and survival action statutes of limitations violated due process "by abrogating the fundamental right to redress in court." *Id.* at 554. Despite the absence of a discovery ruled, the court disagreed. "[B]ecause statutory periods are in some sense arbitrary, the period to initiate suit occasionally expires before a claimant has sustained any injury." *Id.* at 555. "Such a statute does not violate due process if the limitation period is otherwise reasonable." *Id.*

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In *Jewson v Mayo Clinic*, 691 F2d 405, 411 (CA 8, 1982), the plaintiff alleged that Minnesota's medical malpractice statute of limitations violated "due process by barring his right to a medical malpractice action before the damage had accrued." The plaintiff learned, belatedly, that his many years suffering cancer treatment were unnecessary because he did not have cancer. Plaintiff claimed that his cause of action accrued when he discovered the misdiagnosis. Noting that the Minnesota Supreme Court had "expressly rejected this so-called discovery rule in a medical malpractice case, the Court held that due process was not violated. Statutes of limitation "sometimes" expire before a claimant has sustained any injury, or "before he knows he has sustained an injury" and "[i]f the limitation period is otherwise reasonable, a claimant is not thereby deprived of his right to due process." *Id.* at 411.

D. If MCL 600.5827, without a common-law discovery rule, is "unfair" or "harsh" in some cases, that will not make it constitutionally infirm

Amici's due process claims are far overshadowed by their (nonconstitutional) arguments that the abolition of common-law discovery rules may result in unfair or harsh consequences for those plaintiffs who do not discover a cause of action before the expiration of the prescribed period. "That the legislative solution appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature and substitute its own solution." *Doe v Dep't of Social Services*, 439 Mich 650, 681; 487 NW2d 166 (1992). "Arguments that a statute is unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992).

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E. Other states have held that statutes can bar causes of action before they are discovered without offending due process

The Negligence Section relies on two non-Michigan, state law cases to support its contention that due process requires common law discovery rules. In *Lillicrap v Martin*, 156 Vt 165; 591 A2d 41 (1989), the Vermont Supreme Court held that a newly amended statute of repose could not be applied retroactively to a cause of action that "arose" before the effective date of the amendment. The court held that a cause of action could become a "vested" property right when the defendant committed the alleged negligence, but would not "accrue" until the injury was discovered.

Similarly, amici rely on *Lott v Haley*, 370 So 2d 521 (1979), where the Louisiana Supreme Court imposed a common-law discovery rule after a statute of repose was amended because retroactive application of the amendment was seen as depriving plaintiffs of causes of action that had somehow vested before accrual. These cases are not instructive. The notion that a cause of action can become a vested property right before it accrues is not shared by Michigan courts. To the contrary, in Michigan, a cause of action does not vest until it accrues. *Karl v Bryant Air Conditioning Co (In re Certified Questions)*, 416 Mich 558, 573; 331 NW2d 456 (1982).

"It is firmly established that there is no vested right in any particular procedure or remedy." *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135 (1994). And the Sixth Circuit has also held that a cause of action vests when injury occurs, and not before: "In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs. An injury in the nature of a tort which occurs after a specified limitation period, such as the discovery of cancer . . . does not give rise to due process protection." *Mathis, supra*, 719 F2d at 141.

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Several states have held that statutes of limitations or repose that bar causes of action before they are discovered comport with due process. In *Cummings v X-Ray Assocs of New Mexico, PC*, 121 NM 821; 918 P2d 1321 (1996), plaintiff claimed such a New Mexico statute violated due process by interfering with her "fundamental right of access to the courts to bring her malpractice claim." *Id.* at 831. The statute required malpractice actions to be brought "within three years after the date that the act of malpractice occurred." The defendant radiology practice took their most recent x-ray in 1988, but plaintiff did not sue until 1993 because she did not discover defendants' misdiagnosis until she learned that she had metastatic lung cancer in 1992. Plaintiff urged that due process required interpreting the date of "occurrence" as the date she discovered that her cancer had spread. The New Mexico Supreme Court rejected this argument, holding that "access to the courts does not always implicate fundamental rights." *Id.* The court stressed that "many, if not most, civil actions do not involve the plaintiff's fundamental rights." *Id.* at 831, 832.

In *King v Paul J. Krez Co*, 323 Ill App 3d 532; 752 NE2d 605 (2001), the plaintiff, seeking damages for an asbestos-related illness, argued that the application of a statute of repose without a discovery rule was "particularly harsh" and violated due process. The Illinois Court of Appeals rejected this argument, holding that a "harsh and unfair" outcome does not constitute a due process violation. *Id.* at 541-542. In *Blaske v Smith & Entzeroth, Inc*, 821 SW2d 822 (Mo 1991), the Missouri Supreme Court, citing MCL 600.5839 and *O'Brien, supra*, together with 31 other states' statutes, rejected a claim that Missouri's statute of repose for architects and engineers violated due process.

Conclusion

Defendants resist the notion that applying MCL 600.5827 as it was written will cheat the Eby Estate out of some constitutionally-protected time to discover *its claim*. Its claim was discovered by when the murder was discovered. What the Estate really seeks is time to discover *the identity* of the alleged tortfeasors. There is absolutely no constitutional imperative in the facts this Estate brings to the Court. And, in this case, both the wrong and the damage occurred by the murder date, so applying the statute as it was written also creates no potential for unfairness. However, what amici fear, that this Court will overrule all non-statutory discovery rules, will not offend due process. Statutes of limitation that bar causes of action before they are discovered, or even before they accrue, square with due process. The Legislature can take such measures to bar claims or it can enact discovery rules. The choice is for the Legislature.

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